INTERIOR BOARD OF INDIAN APPEALS

Jackson County, Oregon, and the Public Guardian for Jackson County
v. Phoenix Area Director, Bureau of Indian Affairs

31 IBIA 126 (09/08/1997)

Related Board case:
31 IBIA 271

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JACKSON COUNTY, OREGON, and
THE PUBLIC GUARDIAN FOR JACKSON COUNTY
v.
PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 96-26-A Decided September 8, 1997

Appeal from denial of a request for disbursement of the entire amount in an Individual Indian Money account to the State court-appointed guardian of the account holder.

Vacated and remanded.

1. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Financial Affairs: Individual Indian Money Accounts

   Under 25 C.F.R. Part 115, the Bureau of Indian Affairs has discretion in determining whether and how to make disbursements from the Individual Indian Money account of a legally incompetent adult Indian or of an adult Indian found to be in need of assistance with his/her financial affairs.

2. Administrative Procedure: Hearings--Hearings--Indians: Generally--Indians: Financial Matters: Individual Indian Money Accounts

   Due process does not require an evidentiary hearing in all cases before the Bureau of Indian Affairs where property rights are affected.

3. Administrative Procedure: Decisions--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

   The failure to verify material facts and/or law upon which a discretionary decision is based constitutes both an error of law and an abuse of discretion.

4. Indians: Financial Matters: Individual Indian Money Accounts--Indians: Trust Responsibility

   The Federal trust responsibility requires that, in determining whether and how to disburse funds from an Individual Indian Money account to a guardian, the Bureau of Indian Affairs consider, inter alia, the experience level and accountability of the guardian. If the

guardian is inexperienced or not fully accountable for use of the funds of the ward, the Bureau must monitor disbursements from the account more closely; but if the guardian is experienced, bonded, and fully accountable to a court, the Bureau does not violate the trust responsibility by disbursing funds to that guardian with less close monitoring and supervision.

5. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

Under the normal, limited review authority which the Board of Indian Appeals has over discretionary decisions issued by the Bureau of Indian Affairs, once the Board has concluded that the Bureau improperly exercised its discretionary authority, it must remand the case to the Bureau for another decision. However, if the Board is specifically granted full authority to review a Bureau discretionary decision, it may reverse such a decision and issue a final Departmental decision on the merits.

APPEARANCES: Craig J. Dorsay, Esq., Portland, Oregon, for Appellants; William Robert McConkie, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Phoenix Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Jackson County, Oregon, and the Public Guardian for Jackson County seek review of a November 3, 1995, decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), denying a request that all funds in the Individual Indian Money (IIM) account of Vincent Alires, an adult full-blood Ute Indian of the Uintah and Ouray Reservation, be released to the Public Guardian for Jackson County. Vincent, who lives in Jackson County, Oregon, has been declared legally incompetent by the Circuit Court of the State of Oregon for Jackson County (court), and the Public Guardian for Jackson County, Oregon, has been appointed by the court to represent him. For the reasons discussed below, the Board of Indian Appeals (Board) vacates the Area Director's decision and remands this matter for further consideration. 1/

Background

In the interest of clarity, the Board omits discussion of procedural problems which arose in this case.

The materials before the Board show that Vincent was born February 17, 1968. Information submitted by Appellants shows that on March 1, 1979,

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1/ On Feb. 9, 1996, after this appeal was filed, Secretarial Order No. 3197 established the Office of Special Trustee for American Indians and transferred trust funds management functions from BIA to the Special Trustee.

Vincent and two brothers were placed in the custody of the Utah State Division of Family Services by order of the Juvenile Court of the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe). 2/ A petition for renewal of the order of custody, which was filed on March 4, 1981, stated that Vincent was mentally retarded, and identified his mother as Alice Tom. The petition requested that custody remain with the Division of Family Services "until a petition can be brought for guardianship with Mrs. Tom's formal approval." In March 1981, Vincent was 13 years old. There is no evidence in the record as to whether Alice Tom ever approved guardianship arrangements.

Nothing before the Board indicates how or when Vincent moved to Oregon, although there is evidence that Vincent has at least one sister living in the area. An undated Oregon State form providing information for requesting a conservatorship/guardianship for Vincent indicates that he grew up in a foster home in Oregon, but that "this was not a licensed or paid Foster home." The record contains no documents from either the Tribal Court or an Oregon State court placing Vincent in foster care in Oregon. It is thus not clear whether the foster care arrangement was officially established. There is nothing in the record indicating whether Alice Tom had any contact with Vincent while he was in foster care in Oregon.

Other documents submitted by Appellants show that, on April 11, 1990, the court appointed Vincent's former foster parents to serve as his guardians. In April 1990, Vincent would have legally been an adult. It appears that the former foster father, then co-guardian, abandoned the family in the fall of 1991, and that the co-guardian former foster mother died in January 1992. On May 1, 1992, the court appointed Appellant Public Guardian as the successor guardian for Vincent.

The Public Guardian was aware that Vincent had some form of financial account in Utah. Apparently, it believed that this was a tribal account. Documents submitted by Appellants show contact by State employees with the Tribal Court and with Alice Tom in the fall and winter of 1992. An undated State form providing information concerning the need for a successor guardian states that one reason for requesting that Vincent be placed with the Public Guardian was "[t]o access Vincent's Tribal benefits. The Tribal court would not recognize the [former foster parents'] guardianship but will work with a government agency."

Present counsel for Appellants states that he was retained because of his experience in Indian law. The administrative record contains a letter counsel wrote on April 29, 1993, to the Uintah and Ouray Agency, BIA (Agency), seeking information on whether Vincent had an IIM account and BIA policies regarding disbursements from IIM accounts. Counsel wrote to the

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2/ The Board notes that the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1994), was in effect when Vincent and his brothers were placed with the Utah Division of Family Services.

All further citations to the United States Code are to the 1994 edition.

Agency Superintendent (Superintendent) on June 16, 1993, notifying him of a dental problem which Vincent was experiencing, and requesting "immediate disbursement to Jackson County of all of Mr. Alires' IIM funds that are in the possession of [BIA]. These funds will be managed under the supervision of the Jackson County Circuit Court in Oregon." 3/

By letter dated July 12, 1993, the Agency Supervisory Social Worker responded to the request for disbursement of funds, stating that she had requested a legal opinion from the Office of the Solicitor "before any major releases are issued." However, she enclosed a form to be used for the request of release of funds for the specific dental problem which had been described in the June 16, 1993, letter.

On February 3, 1995, the Superintendent issued a decision concerning the request for release of Vincent's entire IIM account. After noting that "the request for an entire amount by a state agency was unusual," the Superintendent stated:

> We have now considered all factors in this case, in view of the discretionary authority of the Secretary, who is the authorized representative of Mr. Alires, and have determined the release of the entire amount would not be in the best interest of Mr. Alires for the following reasons:
>
> a. If the entire amount were turned over to the state, we would not be able to monitor the release of funds which would diminish our trust responsibility.
>
> b. We have been advised by the lawyer, and the case manager that attorney and administration fees will be taken from this account. It has been determined that no attorneys fees, overhead or administrative fees will be allowed to be paid from Mr. Alires' IIM fund.
>
> c. The present process allows us to disburse funds for the health, education and welfare of Mr. Alires. Therefore, we will not release the entire amount of Mr. Alires' funds.
>
> In my telephone conversation with the case manager, Mr. Alires' care is provided for by the state. His room and board is paid by his SSI payment of $458 and $85 personal spending budget is provided for him.
>
> The case manager and the Agency Social Worker have identified the following needs of Mr. Alires:

3/ Because the requests for Vincent's funds shifted from the Tribe to BIA, there is no information in the record as to whether Vincent may also have funds under Tribal control to which he is entitled.

a. Monthly allowance
b. Clothing
c. Television, furniture (bed and bureau for his room)
d. Cosmetic dental work
e. Vacation expenses

We have requested an estimation of these costs with specific amounts per item so that we can begin to disburse funds to pay for these items.

We will cooperate in providing quick payment to meet the need of Mr. Alires. A procedure will be coordinated with the case manager to provide timely and quick response to insure implementation of proper and authorized disbursement.

We trust you understand that our responsibility in this case is to protect the interest of our Indian client and we believe that we have exercised our discretionary commitment to fulfill this responsibility.

Feb. 3, 1995, Letter at 1-2.

Appellants appealed to the Area Director, who affirmed the Superintendent's decision on November 3, 1995. The Area Director's decision states:

The disbursement of these [IIM] funds are, therefore, discretionary within the parameters outlined in [25 C.F.R. § 115.5]. In the February 3, 1995, decision of [the Superintendent], we find the following statement:

> We have now considered all factors in this case, in view of the discretionary authority of the Secretary, who is the authorized representative of Mr. Alires, and have determined the release of the entire amount would not be in the best interest of Mr. Alires for the following reasons... [Ellipsis in original.]

Page 1 of the Superintendent's February 3, 1995 letter.

We understand this statement to mean that the Superintendent considered your request for a release of the entire IIM account and refused to make such release based upon his discretionary authority taking into consideration "the best interest of Mr. Alires." The Superintendent emphasizes this reason on page two of his decision, wherein he states:

> We trust you understand that our responsibility in this case is to protect the interest of our Indian client and we believe that we have exercised our discretionary commitment to fulfill this responsibility.

> We find nothing in the February 3, 1995 decision, that suggests that [the Superintendent] does not have the authority to disburse funds from an IIM account to a legal guardian. It is clear that the Superintendent does have such authority, but only upon "such conditions as the Secretary or his authorized representative may prescribe." 25 C.F.R. Section 115.5.
>
> I hold that the Superintendent does have the authority to disburse IIM funds to a legal guardian or curator under such conditions as he may prescribe. I also hold that such disbursement is in his discretion giving due consideration to the facts of the case. It is my belief and I so hold that the decision of the Superintendent was reasonable and I affirm the decision.

Nov. 3, 1995, Decision at 2.

Appellants appealed this decision to the Board. Briefs have been filed on appeal by Appellants and by the Area Director.

Standard of Review

[1] The Board has previously held that BIA has discretion in approving disbursements from an IIM account. See, e.g., Muscogee (Creek) Nation v. Muskogee Area Director, 28 IBIA 24 (1995); Miller v. Anadarko Area Director, 26 IBIA 97 (1994); Connovichnah v. Acting Anadarko Area Director, 9 IBIA 179, 89 I.D. 71 (1982). The Board has limited authority to review BIA discretionary decisions. 43 C.F.R. § 4.330(b)(2). When a BIA decision is based on the exercise of discretion, the Board does not substitute its judgment for that of BIA, but reviews the decision to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. However, even when a decision is based on an exercise of discretion, the Board requires that the BIA deciding official provide a reasoned basis for his/her decision. See, e.g., Muscogee (Creek) Nation, 28 IBIA at 31, and cases cited therein; Blackhawk v. Billings Area Director, 24 IBIA 275 (1993). See also Bowen v. American Hospital Association, 476 U.S. 610, 626-27 (1986).

At pages 11-12 of their Opening Brief, Appellants state that they

> disagree with the conclusion of the Board [in Muscogee (Creek) Nation] that the BIA exercises discretionary authority under the terms of 25 CFR §115.5. Appellants do not dispute that the term "may" in that section is intended to give the deciding official some discretionary authority; however, appellants believe this regulatory discretion is contrary to controlling law and the BIA's trust responsibility.

Appellants cite Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995), which, they contend, limits BIA's discretionary authority when property rights are involved. They argue: "The [BIA's] discretion in the present case under 25 CFR §115.5 is clearly limited by Vincent's property interest in his IIM

account. Any denial of disbursement of Vincent's IIM funds must be based on clearly articulated reasons in a hearing where all evidence is available and can be controverted. Such did not happen in the present case." Id. at 13.

Appellants appear to be making three separate arguments here: (1) the discretionary authority contained in 25 C.F.R. § 115.5 is contrary to law, (2) the discretionary authority contained in 25 C.F.R. § 115.5 is contrary to BIA's trust responsibility, and (3) BIA cannot deny a requested disbursement from an IIM account without holding an evidentiary hearing. Unfortunately, they do not develop any of these arguments, leaving the Board to speculate as to their actual intent.

To the extent Appellants argue that any discretionary authority found in 25 C.F.R. § 115.5 is contrary to law, they appear to be seeking a declaration that the regulation is invalid as being ultra vires. The Board lacks authority to declare a duly promulgated Departmental regulation invalid. Edwards v. Portland Area Director, 29 IBIA 12, 13 (1995); Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994), and cases cited therein.

Appellants make no attempt to show how the existence of discretionary authority is contrary to, or incompatible with, BIA's trust responsibility. The Board therefore rejects this argument. In other parts of their Opening Brief, Appellants raise arguments apparently intended to show that BIA has not properly exercised its trust responsibility. The Board addresses these contentions infra.

In regard to Appellants' argument concerning an evidentiary hearing, it is possible they intended to argue that a decision cannot be discretionary if an evidentiary hearing is required. The Board rejects any such contention based on Appellants' failure to provide any support for it.

If, however, Appellants intended to argue that an evidentiary hearing circumscribes the exercise of discretion by providing a factual background for the decision, the Board addresses this argument infra.

[2] Appellants may also have intended to argue that Greene requires a hearing under the Administrative Procedure Act (APA), 5 U.S.C. § 554, in any matter which involves a property interest. If the Board were to accept this argument, it would be required to overrule a consistent line of cases in which it has held that "evidentiary hearings before BIA are not required in all cases where property rights are affected," and that an appellant's due process rights are protected by the right to appeal a BIA decision to the Board. Guardian Life Insurance Co. of America v. Acting Anadarko Area Director, 22 IBIA 104, 122 (1992). See also All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202 (1992), and cases cited therein. The Board has carefully reviewed its prior decisions in light of Greene and concludes that Greene is not inconsistent with the Board's cases. The Board repeats its discussion of this issue found in All Materials of Montana, 21 IBIA at 210-11:

The first issue is whether appellant is entitled to an evidentiary hearing as an aspect of due process. The Board has previously considered whether administrative review proceedings which do not include evidentiary hearings meet the requirements of due process. * * * [The Board's conclusion that evidentiary hearings are not required in every case which involves property rights] is supported by the Supreme Court's unequivocal ruling in Matthews v. Eldridge, 424 U.S. 319, 348-49 (1976):

> The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." * * * All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capabilities and circumstances of those who are to be heard." [Citations omitted.]

The Department's regulations provide an administrative review process which meets the requirements of due process. Under 25 CFR Part 2, parties have the opportunity to present to the Area Director evidence and arguments against the decision of a subordinate BIA official. The Area Director has full authority to reverse the subordinate's decision.

Furthermore, an aggrieved party has an additional right to appeal under the procedures established in 43 CFR Part 4, Subpart D, which provide for review of an Area Director's decision by the Board, an entity independent from BIA. As was stated in the preamble to the last revision of the Board's procedural regulations at 54 FR 6484 (Feb. 10, 1989):

> The Office of Hearings and Appeals was created as a separate office within the Office of the Secretary of the Interior in 1970 to provide independent, objective administrative review of decisions issued by the Department's various program Bureaus and Offices. In promulgating the initial regulations providing for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: "Exercise of the Secretary's review authority by the Board of Indian Appeals will ensure impartial review free from organizational conflict in that the Board is part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs." 40 FR 20819 (May 13, 1975).

Appellant was afforded an opportunity to present evidence and arguments to the Area Director. It had an additional opportunity to have the matter reviewed by this Board. Appellant was

> not deprived of due process merely because it did not receive an evidentiary hearing.

Clearly, Greene could not overrule Matthews. Furthermore, the Board finds no inherent conflict between the cases. In Matthews the Supreme Court required that "'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" 424 U.S. at 348 (quoting from Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). In Greene the court of appeals approved the district court's ordering of an APA hearing "in the absence of any other existing mechanisms" for review. 64 F.3d at 1274. In contrast to the decision under review in Greene, Appellants here had the right to appeal to the Board. As discussed in All Materials of Montana, an appeal to the Board is an administrative mechanism for allowing a person aggrieved by a BIA decision, or in jeopardy of serious loss because of such a decision, to meet the case against him/her, and for correcting any error BIA may have committed. The Board reaffirms its prior holdings that due process does not require an evidentiary hearing merely because a property interest is involved.

Because it finds Appellants' arguments against the existence of discretionary authority unpersuasive, the Board holds that BIA has discretion under 25 C.F.R. § 115.5 in determining whether to disburse funds from the IIM account of a legally incompetent adult Indian or of an adult Indian found to be in need of assistance with his/her financial affairs. Therefore, the Board will follow its normal standard of review, set forth above.

Discussion and Conclusions

Regulations governing IIM accounts are found in 25 C.F.R. Part 115. 4/ Section 115.5 concerns disbursements from the IIM accounts of adults under legal disabilities. It provides:

> The funds of an adult who is non compos mentis or under other legal disability may be disbursed for his benefit for such purposes deemed to be for his best interest and welfare, or the funds may be disbursed to a legal guardian or curator under such conditions as the Secretary or his authorized representative may prescribe.

Appellants state that "[t]he existence of any BIAM [Bureau of Indian Affairs Manual] provisions dealing with disbursement of the IIM funds [of] an adult Indian under a legal disability to a guardian has been an issue in his case for over two years." Opening Brief at 18. Appellants provide a chronology of their attempts to obtain copies of any relevant BIAM provisions. In summary, Appellants assert that (1) they requested copies of any such BIAM provisions under the Freedom of Information Act (FOIA) in December

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4/ These regulations were previously found in 25 C.F.R. Part 104. Part 104 was redesignated as Part 115, without substantive change, at 47 Fed. Reg. 13,327 (Mar. 30, 1982). For consistency and clarity, only Part 115 will be cited in this decision.

1993 and January 1995; (2) the Superintendent issued his decision denying their request for disbursement of Vincent's IIM account in February 1995; (3) they appealed the Superintendent's decision in February 1995; (4) they appealed BIA's refusal to release BIAM provisions in September 1995; (5) the Superintendent requested relevant BIAM provisions from the Area Office in September 1995; (6) they received the provisions, identified as 66 IAM, 5/ in October 1995; (7) on October 26, 1995, they submitted the 66 IAM provisions, with a supplemental brief, to the Area Director for consideration in their pending appeal from the Superintendent's February 1995 decision; (8) the Area Office received their filing on November 2, 1995; and (9) the Area Director's decision, which was issued on November 3, 1995, did not refer to the IAM provisions, although it did refer to the supplemental brief. Appellants argue:

> It is clear that [BIA], both at the Agency and Area level, did not consider controlling internal authority for disposition of this case * * *. It cannot be seriously argued that there exists a substantial and reasonable basis for the Agency and Area's decision * * * when [BIA] does not even know of the existence of internal authority controlling its decision, let alone reference that authority.

Opening Brief at 22. It was not until the Area Director filed his Answer Brief in this appeal that it was disclosed that the IAM provisions had in fact been reissued in February 1984 as part of the BIAM.

The Board has previously addressed the legal significance of provisions set forth only in the BIAM. It has consistently followed the holding of the Supreme Court in Morton v. Ruiz, 415 U.S. 199, 235 (1974), that the BIAM is "solely an internal-operations brochure," which, in distinction from properly promulgated regulations, does not have the force and effect of law. See, e.g., Robles v. Sacramento Area Director, 23 IBIA 276 (1993) (vacating a decision based on provisions set forth only in the BIAM and remanding the matter for consideration under the relevant regulations). When provisions found only in the BIAM have been cited to it, the Board has enforced those provisions against BIA, but not against outside parties with no knowledge of the existence or content of those provisions. 5 U.S.C. § 552(a)(2)(ii); Carter v. Acting Billings Area Director, 20 IBIA 195, 203-04 (1991) ("[h]aving issued the BIAM, BIA is obligated to abide by its terms where not to do so might result in a deprivation of benefits to an applicant"); Price v. Portland Area Director, 18 IBIA 272, 276 n.4 (1990).

Many people dealing with BIA do not know the BIAM exists, let alone that BIA might rely on it in reaching decisions. Based on his experience in Indian matters, counsel for Appellants had reason to suspect that relevant BIAM provisions might exist and to persist in trying to locate them.

5/ An Oct. 12, 1995, transmittal memorandum from the Area FOIA Coordinator to, apparently, the Agency FOIA Liaison states: "The BIA has a material weakness in its Directives Management (BIAMS). The information I am forwarding to you points this out. The dates of the material precede the BIAMs and are from the earlier versions called IAMs."

Because the BIAM provisions were revealed during the course of this proceeding, the Board considers Appellants' arguments based on the BIAM even though those provisions do not have the force and effect of law.

Subsection 6.4.3 of 66 BIAM provides:

> Supervision of Accounts of Adults Under Legal Disability or Non Compos Mentis, 25 CFR [115].5. Prior to disbursements from funds belonging to an adult under legal disability in payments according to 25 CFR [115].5, the interests of such adult may be protected by:
>
> (1) Determining his legal dependents, and the extent of his ability to support himself and his legal dependents from his own resources.
>
> (2) Setting up a disbursement schedule for payments to meet his requirements for his support, health and welfare and for his legal dependents; and obligating funds for such purposes.
>
> (3) Making an inventory of all trust property and interests in trust property owned by the adult, and applying authority for its management in accordance with appropriate Department regulations, and wherever possible and necessary, establishing or causing to be established an income-maintenance program for such adult.
>
> (4) Disbursing funds in the discretion of the Superintendent to a guardian or curator for the adult authorized under State law to receipt for, to manage and invest the funds at least cost to the adult and under appropriate bond.

Disbursements to a guardian are further addressed in 66 BIAM 6.4.4:

> Payments to Legal Guardians Under 25 CFR [115].4 and [115].5. [6/] Regular monthly payments, in the discretion of the Superintendent, may be made to legally appointed guardians for the purposes stated in 25 CFR [115].4 and 25 CFR [115].5. When, in the judgment of the Superintendent, funds in substantial amounts are transferred to the guardian, in lieu of monthly arrangements, for purposes given in 25 CFR [115].4 and 25 CFR [115].5, the guardian shall be required to file with the Superintendent, a copy of his letter of guardianship, and evidence of sufficient bond approved by the appointing court, and thereafter, copies of reports prior to submission to the court for approval. In reviewing the reports, the Superintendent may raise questions with the guardian or may make such recommendations to the court as he considers to be within the best interest of the owner.

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6/ Section 115.4 deals with disbursements from the IIM accounts of minors, and is not directly relevant to this discussion.

Appellants contend that 25 C.F.R. § 115.5 and 66 BIAM Chapter 6 anticipate the disbursement of substantial amounts from an IIM account to a court-appointed guardian, under such conditions as BIA may prescribe. They argue that they are legally bound by the same fiduciary obligations as BIA, and are equally--if not more--capable of determining Vincent's needs on a day-to-day basis, and can respond to those needs promptly if they have control of his entire IIM account.

The Board agrees with Appellants that both section 115.5 and the BIAM provisions anticipate disbursement of the IIM funds of a legally incompetent adult to a guardian. It also agrees that neither the administrative record nor the decisions contain any evidence that either the Superintendent or the Area Director considered the BIAM provisions in declining to disburse the funds in Vincent's IIM account. In fact, the record supports Appellants' conjecture that at least the Superintendent was ignorant of the existence of these provisions when he issued his decision.

Despite its agreement on the above points, however, the Board concludes that the BIAM provisions, like 25 C.F.R. § 115.5, clearly and explicitly state that disbursements to a guardian--whether as monthly payments or in substantial amounts--are within BIA's discretion. The Board finds nothing in 66 BIAM Chapter 6 which precludes BIA from denying Appellants' request for disbursement of Vincent's entire IIM account.

Appellants also contend that 25 C.F.R. § 115.5 creates two conditions for the disbursement of the IIM funds of a person who is non compos mentis or under other legal disability. They argue that the first part of the regulation authorizes BIA to disburse IIM funds "for [the account holder's] benefit for such purposes deemed to be in his best interest and welfare." They contrast this with the second part of the regulation, which provides for disbursements of IIM funds "to a legal guardian or curator under such conditions as the Secretary or his authorized representative may prescribe," but which does not contain the words "best interest." Appellants argue that BIA improperly used the "best interest" standard found in the first part of the regulation in reaching a decision under the second part. They contend:

> There is a logical connection to this separation. In the first case the BIA is acting in the role of surrogate guardian for an adult, incompetent Indian, making disbursements on an individual basis for a specific individual in that person's best interest. In the second case, the decision is to release an adult, incompetent Indian's IIM funds to a legally appointed guardian, who is under an identical legal obligation to make individual disbursements for his or her ward's benefit in that ward's best interest. The best interest test is properly not part of the second standard; instead, it is properly part of the conditions the Secretary may prescribe - that the guardian comply in making disbursements with his or her statutory obligation to act in the fiduciary interest of his or her ward.

Opening Brief at 13-14.

The Board finds this argument unpersuasive. Whether expressed or not, the primary obligation of any fiduciary is to act in the best interest of the ward. The Board holds that BIA neither abused its discretion nor violated the law by considering Vincent's best interest in deciding whether to disburse his entire IIM account to his court-appointed guardian.

Appellants also challenge each of the three reasons which the Superintendent gave for denying their disbursement request. The Board first addresses the Superintendent's statement that attorney and administration fees would be taken from Vincent's IIM account if the entire account were disbursed to Appellants. The record does not reveal any factual basis for this statement. In the Area Director's Answer Brief, counsel states his belief that Agency personnel received this information in a telephone conversation with Appellants' counsel. Counsel for Appellants denies both providing any such information, and any intent to take attorney and/or administration fees from Vincent's IIM funds. In a February 23, 1995, letter, Vincent's State Case Manager similarly states that she "at no time discussed the subject of possible administration fees for the administration of a trust fund for Mr. Alires." An August 25, 1992, letter from a different State Case Manager to a Tribal Judge states: "All funds are used for the direct needs of the client. The county charges no fees." Although there is no evidence before the Board showing that BIA saw this letter, it provides corroborative evidence for Appellants' present assertions dating from a time long before the present controversy arose. At page 28 of their Opening Brief, Appellants state that use of Vincent's funds for attorney and/or administration fees "would be contrary to Oregon law, and would result in revocation of the certificate of the guardian."

[3] The Board finds no evidence to support BIA's statement that attorney and/or administration fees would be taken from Vincent's IIM funds if the entire account were disbursed to the court-appointed guardian. It appears that this reason for BIA's decision may be based on a mistake of both fact and law. The Board holds that the failure to verify material facts and/or law upon which a discretionary decision is based constitutes both an error of law and an abuse of discretion. The Board therefore vacates this reason for BIA's decision.

The two remaining reasons which the Superintendent gave in support of his decision are actually two ways of saying the same thing--that BIA wants and intends to monitor the disbursement of Vincent's IIM funds on a day-to-day, or item-by-item, basis. Based on the discussion above, the Board finds that such a decision is within BIA's discretionary authority.

However, despite this holding, the Board finds that it cannot affirm the Area Director's decision.

[4] Initially, it appears that the decision to monitor closely the use of Vincent's IIM funds was based on a belief that BIA's trust responsibility requires close supervision whenever funds are disbursed to a guardian. The Board disagrees. The trust responsibility requires BIA to act in the best interest of Vincent Alires in disbursing funds from his IIM

account. This includes ensuring that any disbursements to a guardian will be used for Vincent's needs, and will not be squandered or used for improper purposes. Here, Vincent's guardian is a public official. Based upon the nature of the position, it is probably a safe initial assumption that the Public Guardian is experienced and knowledgeable concerning guardianship matters, has ready access to legal guidance concerning his/her responsibilities, is bonded, and is fully accountable to the court which appointed him/ her. This level of experience, expertise, and accountability contrasts with what might be expected of a private guardian, who was appointed because of friendship or a family relationship with the ward. The Board concludes that part of BIA's trust responsibility in regard to disbursements from an IIM account to a guardian includes an examination of the experience level and accountability of the guardian. If the guardian is inexperienced or not fully accountable, the trust responsibility requires BIA to monitor disbursements more closely. However, if the guardian is experienced, bonded, and fully accountable to a court, BIA does not violate its trust responsibility by disbursing funds to the guardian with less close monitoring and supervision.

The Board finds nothing in the record which shows that BIA considered the qualifications or legal obligations of Vincent's court-appointed guardian in determining whether to disburse funds to that guardian.

Furthermore, the Board concludes that BIA has failed to provide a reasoned basis for its decision declining to disburse all funds in Vincent's IIM account to his guardian. The Superintendent indicated that he had "considered all factors in this case." The Area Director quoted this statement in affirming the Superintendent's decision. There is, however, nothing in the record, the decisions, or the Area Director's Answer Brief showing that BIA considered any factors, let alone all of them. There is not even any indication of what "factors" BIA believed needed to be considered. Assuming that BIA meant "facts" when it used the word "factors," there is also no evidence that BIA considered the particular facts of this case. Nothing in the record shows that BIA was aware of Vincent's condition and life circumstances prior to Appellants' request for his IIM funds; that it thereafter made any effort to learn about his condition; or that, after being notified of the appointment of a State guardian, it took any action on Vincent's behalf beyond disbursing funds for his dental work.

In addition to the lack of evidence of any positive involvement by BIA in Vincent's life, there are suggestions in the materials before the Board that BIA may have been influenced in its decisionmaking by Alice Tom and/or other of Vincent's relatives. See, e.g., a November 22, 1993, memorandum from the Agency Administrative Officer to the Superintendent, which states:

> Before any monies are released to the State of Oregon, I recommend:
>
> 1. This case be reviewed -
>
> I understand that the family at Ft. Duchesne have tried to bring him back to the U&O [Uinah and Ouray] Reservation.

> Was the U&O Agency contacted when the foster family was dismantled and Vincent was placed with the State?
>
> The family in Ft. Duchesne at one time rejected the release of Vincent's funds. [7/]
>
> 2. As a citizen of the United States, Vincent Alires should be eligible for any assistance that any other citizen would be eligible for as a mentally handicapped individual and should not be as needy as indicated.
>
> As we have done with our nursing home patients, all benefits such as Medicaid, Medicare, SSI, etc. should be pursued.
>
> 3. The BIA - through IIM - can provide for extra needs such as dental, etc.

The Board finds it distressing to believe it necessary to emphasize that the funds in Vincent's IIM account belong to him--not to his biological mother, not to any other relative, not to the Tribe, and especially not to BIA. There is also nothing to suggest that BIA considered Vincent's personal circumstances and reached a reasoned decision that the funds in his IIM account needed to be preserved rather than expended for his benefit. 8/

Unfortunately, the Board believes that the real--but unstated--basis for BIA's decision may be found at page 5 of the Area Director's Answer Brief:

> The Secretary of the Interior acts as trustee or guardian of the funds in [IIM] accounts. The Secretary receives his authority under federal law. The Oregon Guardian is appointed under Oregon state law. This case is a contest between two guardians, the Secretary of the Interior acting under federal law and the Oregon Guardian acting under state law. It is, therefore, a contest between the federal government and a state government. The Supremacy Clause of the United States Constitution, Article VI, Clause 2 states that the federal Constitution and the laws of the United States "shall be the supreme law of the land." State law and policy must yield to conflicting congressional legislation.

7/ See also a July 9, 1993, Memorandum to the Superintendent which states that the writer had been informed that the Public Guardian had attempted to reach Vincent's IIM account through tribal court, but that Alice Tom had apparently opposed and stopped this action.

8/ Such a decision might have been reached, for example, if Vincent had dependents for whom he had a legal obligation of support. Cf. 66 BIAM 6.4.3(1) and (2), quoted supra. There is no suggestion that any such dependents exist.

See also Answer Brief at 11. The Answer Brief further states at page 15: "Just as the Oregon guardian would find it absurd to surrender some of its statutory and common law duties as guardian, the BIA finds it equally ludicrous to abdicate its role as guardian without authority or obligation to do so."

The Board finds the implications of these statements very disturbing. The "supreme law" in this case is the best interest of Vincent Alires, an incompetent adult who is the legal ward of two guardians--one Federal and one State. However, it appears quite possible that Vincent's Federal guardian has ignored--or worse yet, not even considered--Vincent's best interest because of a perceived "turf war" with his State guardian. Both 25 C.F.R. § 115.5 and 66 BIAM Chapter 6 anticipate that BIA will cooperate with a legally appointed guardian on behalf of their joint ward. There has been no cooperation here. Unfortunately, Vincent is the one who suffers.

The Board also finds it disturbing that BIA makes these arguments when the administrative record fails to include even one document demonstrating that BIA has taken an active role in determining Vincent's needs, investigating his personal and financial circumstances, or otherwise acting in his best interest. To date BIA has, at most, responded to a request for funds to pay for dental expenses. At worst, it may have withheld funds, or disbursed them in a miserly fashion, at the behest of individuals who have no apparent legal right to control those funds.

However, even giving BIA the benefit of the doubt, the Board concludes that (1) the decisions in this case were based on an incorrect interpretation of law--i.e., that the disbursement of IIM funds to a court-appointed guardian of an incompetent adult Indian constitutes a violation of the Federal trust responsibility; (2) the decisions lacked an adequate factual basis; and (3) BIA erred both as a matter of law and as a matter of discretion by failing to provide a reasoned basis for its decision. Under these circumstances, the decisions must be vacated.

Appellants ask

> that the Board's decision include any order requiring the immediate disbursement of the IIM funds belonging to Vincent Alires to the care and control of the Public Guardian. While the normal procedure might be to remand the case for further determination by the Agency or Area, the unique facts of this case militate against such a resolution in this case. First, the facts in the existing record clearly support such a disbursement. No further fact-finding is necessary; the Agency need only draft reporting requirements for the Guardian. Second, the Agency and Area's record of delay and obstruction in this case counsels against any further action by the BIA in this case. This matter, a simple request for disbursement of IIM funds that should have taken no longer than 3 months, has already dragged on for over three years. Finally, as discussed above, appellants question whether the Agency and Area can be objective in this case.

Opening Brief at 36-37.

[5] The Board cannot grant this request. As discussed, BIA has discretion in approving disbursements from an IIM account. Although the Board has concluded that BIA erred here both as a matter of law and as a matter of discretion, the ultimate decision remains discretionary. On a few occasions, the Assistant Secretary - Indian Affairs has authorized the Board to review fully BIA's exercise of discretion. E.g., Robinson v. Acting Billings Area Director, 20 IBIA 168, 170-71 (1991). If the Board is granted this authority, it may review a BIA discretionary decision even to the extent of substituting its judgment for BIA's. It may, therefore, as it did in Robinson, reverse a discretionary BIA decision and issue a final Departmental decision on the merits. The Board has not been authorized here to review fully BIA's exercise of discretion. Therefore, under its normal, limited review authority over discretionary decisions, once it has concluded that BIA has exercised its discretion improperly, the Board must remand the case to BIA for another decision.

In addition, as noted in footnote 1, supra, trust funds management is now under the jurisdiction of the Special Trustee for American Indians. The Board is not fully informed on the interaction between BIA and the Special Trustee. As relevant to this case, it may be that requests for disbursements from an IIM account to a guardian are now being considered by the Special Trustee or his delegate. In remanding this matter, the Board intends that a new decision will be issued in accordance with the presently existing division of responsibilities between BIA and the Special Trustee.

The Board also anticipates that a new decision will be issued expeditiously. If no decision is issued within a reasonable period of time, Appellants may invoke the procedures in 25 C.F.R. § 2.8 to elevate the matter to the next official in the appeal process.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Phoenix Area Director's November 3, 1995, decision is vacated and this matter is remanded for further consideration not inconsistent with this decision. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

9/ Any arguments not discussed were considered and rejected.